No. 10128

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
For the District of Idaho, Northern Division.
HON. CHARLES C. CAVANAH, District Judge

EZRA R. WHITLA
E. T. KNUDSON
Coeur d'Alene, Idaho,
Attorneys for Appellant.

No. 10128

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
For the District of Idaho, Northern Division.
HON. CHARLES C. CAVANAH, District Judge

EZRA R. WHITLA
E. T. KNUDSON
Coeur d'Alene, Idaho,
Attorneys for Appellant

SUMMARY OF CONTENTS OF RECORD

General Statement of the case and pleadings Pages 2 to 17.

Statement of the Evidence, pages 17 to 33.

Statement of Assignment of Errors and group thereof, pages 33 to 36.

Summary of Assignment of Errors, 9 to 13 incl., grouped under the heading that the court has failed to make findings on the issue involved and that the findings made are by conclusions of law. The argument on this covers pages 36 to 42.

Assignment of Error No. 2, covering the point that the laws and the decisions of the Idaho courts require the District Commissioners to drain the land and keep the ditches cleaned out and that this is mandatory and that the commissioners have only such duties as are conferred upon them by law and that 3 judgments of the District Court had ordered this done. The question is therefore res judicata and binding on this court, pages 42 to 54.

Assignments of Errors 3 to 7, incl., undisputed evidence shows that the commissioners refused to do their mandatory duty required by three judgments in the court; Woldson and his predecessors paid all maintenance assessments against the land and were entitled to have ditches cleaned out and the defendants who fail to do their statutory duty as adjudged by the Idaho Court become liable when they fail and neglect to perform this duty, pages 54 to 64.

Assignment of Error No. 14, the court erred in failing to find on the questions as to whether or not the commissioners did or did not fail to perform their duties and there being no discretion in the commissioners but

their duty being mandatory and ministerial, commissioners bound to keep ditches open and drain the land, and cannot substitute their judgment of the law and the orders of the court, pages 64 to 76.

AUTHORITIES

Abraham v Casey, 179 U. S. 210; 45 L. ed. 156
Amy v Barkholder, 11 Wallace 136; 20 L. ed. 101
Asher v Bone, 100 Fed. (2) 315

Bice v Brown, 167 Pac. 1098
Booth v Groves et al, 43 Ida. 703; 255 Pac. 637
Breckenridge v Johnston, 108 Pac (2) 833
Buhl Hgh. Dist. v Allred, 41 Ida. 54
Burt et al v Farmers Co-op Irr. Co., 30 Ida .752

Christensen v Gorton, 36 Ida. 436
Collins v Twin Falls etc. Water Co., 28 Ida. 1
Corker v Comm'rs., 10 Ida. 255
Corpus Juris Vol. 19, P. 700, Par. 191
County v Drainage Dist. No. 1, 139 N. W. 649
Croft v Millard Co. Drainage Dist., 202 Pac. 539

Dunn v Treffry, 260 Fed. 147

Elliott v Porter, 6 Ida. 684; 59 Pac. 360

Gorman v Board Comm'rs., 1 Ida. 553
Guttschenritter v Whitmore, 139 N. W. 567

Hardin v Hardin, 129 N. W. 108
Harrison v Remington Paper Co., 140 Fed. 385
Hupe v Sommer, 129 Pac. 136

Idaho Statute:
Sec. 41-2501 to 41-2609, incl. I. C. A.
Sec. 41-2522 I. C. A.
Sec. 41-2539 I. C. A.
Sec. 41-2543 I. C. A.

Johnson v Young, 55 Ida. 271

Lineker v Marshall, 7 Fed. (2) 875
Leary v Board Drainage Comm'rs., 89 S. E. 803

Lyon v Perrin & Gaff Co., 125 U. S. 689; 31 L. ed 839

McQuillan Municipal Corp., Vol. 2, Sec. 499
Moore v Russell, 65 Pac. 625

O'Brien's Manual Fed. Appellate Procedure, Third Edition, P. 17

Packer v Whittier, 91 Fed. 511
Payne v Baehr, 95 P. 895
People v Brown, 111 N. E. 537
People v Comm'rs., 22 N.E. 596
Peotone & Manteno Union Drainage Dist. v Adams, 45 N. E. 266
Proper v Sutter Drainage Dist., 200 Pac. 664
Prothero v Board of Comm'rs., 22 Ida. 598
Perkins v Blauth, 127 Pac. 50

Richardson v Ruddy, 15 Ida. 488; 98 Pac. 842

State v American Surety Co., 26 Idaho 652; 145 Pac. 1097
State v Hundley, 87 So. 890
State v Title G. & S. Co., 27 Ida. 752; 152 Pac. 189
Strickfadden v Greencreek Hgh. Dist.; 42 Ida. 738; 248 Pac. 456
Stoddard v Keefe, 116 N. E. 193
1933 Session Laws, P. 54
1935 Session Laws, P. 11

Tholkes v Decock, 147 N. W. 648
Thompson v Hughes, 121 N. E. 387

United States v Kelly, 89 Fed. 946
United States v Stratton, 88 Fed. 54
United States Statutes:
Sec. 764, Title 28 U.S.C.A.
Sec. 773, Title 28 U.S.C.A.
United States Supreme Court Rules, 52a

Village of Heyburn v Security Sav. & Trust Co., 55 Ida. 732; 49 Pac. (2) 258

Wells v Western Union T. Co., 123 N.W. 371

No. 10128

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action prosecuted by the plaintiff Martin Woldson against the defendants and their surety for failure and refusal to perform their duty as commissioners of Drainage District No. 1 of Bonner County, Idaho.

Situated in Boundary County, Idaho, adjoining the Kootenai River, was a large tract of swamp land, overflowed annually by the Kootenai River, and which the owners were desirous of formnng into a drainage district, to dike and drain the same in order that it might be made suitable to produce a large amount of crops. Such proceedings were taken under the laws of the State of Idaho that on the 21st day of October, 1920, a decree was duly entered, organizing the drainage district, and the decree appears set out in full on pages 22 to 25 of the record. Thereafter the parties duly appointed to report the benefits and damage did so and the district was thereupon organized.

A portion of said District was lower than the balance, which the parties knew would take more time to dry out and drain, so the levy of assessments against it was deferred. Thereafter the commissioners made a report of a supplemental levy to include this land, which they

claimed had been drained, to which the former owners of the land in controversy made objection.

A stipulation was made between the parties that the commissioners of the district would within a reasonable time clean out, deepen and improve the drainage ditch so as to suitably and effectively drain this land, and that there might be entered in the order confirming the assessment roll such a provision, Plaintiff's Exhibit 17, page 213.)

Upon that stipulation being made, the decree was entered confirming this assessment, which decree set a flat rate of $47.5016 assessment against each and every acre of land in the district, to pay for the construction, which was to include the cleaning out and deepening of these ditches. The decree is lengthy and appears on pages 215 to 255 of the record. By this decree a lien was established upon the land for this assessment, p. 245, where it was ordered as follows:

> "It is further Ordered, Adjudged and Decreed that the Assessment roll filed by the Commissioners be and the same is hereby confirmed and approved as an additional assessment, and the lien against each subdivision, parcel lot or tract of land within said drainage district for the cost of said improvement is hereby declared and established as follows, to-wit:

Then the complete assessment in the Mirror or Sproll's Lake area, which is the area in controversy in this suit, showing the lien against this land for that sum.

The court found that upon this work being done it would benefit the lands to the extent of $150.00 per acre, p. 251.

Upon the stipulation of the parties, and as a concluding paragraph of that decree, the court adjudged and decreed as follows:

> "It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit: (Then follows a description of the land.)"

This was the first court order to do the work now complained of and a final judgment that this work should be done. This decree was dated August 20, 1924, but the decree was not complied with, and thereupon, in December of 1924, the parties who had objected, filed a petition for an order to show cause to set aside that supplemental assessment because the land had not been drained. This appears as Plaintiff's Exhibit 17, pages 208 to 213, inclusive.

The commissioners filed an answer to this petition, which appears on pp. 197 to 200, inclusive. This answer admitted that the land was not drained because obstructions had been formed in

the drainage ditch, and that the commissioners had had a disinterested engineer to make a survey, and that said engineer,—

> "Has made a survey of the land within said District and has made a report to the Commissioners setting forth *that the only work* required to be done in order to completely drain the land of the objectors is that the entire ditch, from its outlet throughout its entire length, be cleaned out and the obstructions removed, so that the original grade of said ditch at the time the same was finally completed be restored."

The Commissioners then alleged that this would be done and that when it was done the land would be suitably drained and that it was a necessary expense to be borne by the entire District. (P. 199.)

Upon this Answer being filed, a stipulation was then entered into which appears on pages 194 to 197. In that stipulation both the officers and the owners of the lands stipulated that the lands had been drained, but were entitled to be suitably drained for agricultural purposes by virtue of the charges and assessments imposed upon said lands for that purpose. (P. 195, Par. 2.)

It was also stipulated that the land owners were entitled to an order directing the commissioners to clean out and maintain the said ditch to the original level thereof and to construct such

laterals as may be required, etc. (Par. 5, p. 196.) and that the maintenance and repair would be a proper item to be charged to the whole district. (Par. 6, p. 196.)

Upon this stipulation and answer the case was heard and decided by the court. Findings, conclusions and decree were entered therein. The findings were in part as follows:

> "That the lands of the above named objectors would be drained if the main drainage ditch of said District had not been obstructed by the caving of banks so that the same is not as deep as originally constructed and as called for by the plans and specifications of said ditch, * * * "

(Par. 2, p. 203.) And it was further found:

> "That if the original grade of the said ditch be restored from its outlet throughout its entire length, and several laterals were dug as recommended by the engineer, * * * the lands of the objectors would be drained sufficiently for agricultural purposes."

(Par. 3, p. 203)

The conclusions of law then were that upon these findings and the stipulation an order should be entered requiring the commissioners to clean out this ditch and that it was a proper maintenance.

Thereupon an order and degree was entered, page 205 to 207, which required the commissioners as follows:

"Be and they are hereby instructed to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof *and maintain said ditch to said original level,* construct such laterals as may be required, * * *."

It was also decreed that the cost of doing this was a proper item to be charged to the entire district, and that such would be done.

This was the second order requiring this work to be done.

However, this was not done and thereafter the owners of this land again brought proceedings to require this work done. The commissioners came in and made a showing that in addition to draining this land they should do a lot of other work to make the entire system effective. A hearing was had upon that and again the court made another order in the matter, which appears as Exhibit "D", p. 31 to 38 inclusive, in which the court recited some of the former proceedings and again decided.

"And it further appearing that the above mentioned order of the court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office."

and the court again ordered the commissioners as follows:

"To deepen and clean out the ditches now

> constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District suitable for agricultural purposes."

The court then approved a further charge against all the land in the district of $23,000.00 to build new outlets, put in pumps, etc. This was the third court order requiring this work to be done.

Under the last order the commissioners did proceed to do some work and spent the entire $23,000.00 mostly *at the outlet,* for the benefit of the entire district, placing a large amount of pipe, changing the outlet altogether, etc. They did not, however, clean out and keep cleaned out the ditches which were provided for by the original plans and specifications under which the assessment was made, through, along and over the lands of the plaintiff, although ordered to do so by three orders of the court.

Mr. Woldson became the owner of this land in 1932. Thereafter the commissioners agreed with him that they would not levy any more assessments against his land until they did drain the same. They did not follow this agreement, but continued to levy maintenance charges against the land in controversy, although never draining the same. The main lateral ran through part of Mr. Woldson's land, which is referred to

generally as the Mirror or Sproll's Lake area, and extended several miles beyond it. Beyond Mr. Woldson's land there was another small, shallow lake called Mud Lake. Bauman and Copeland, the present commissioners, lived above and beyond Woldson's land. This same drainage ditch drained their land. Their land was considerably higher than Woldson's and the water from the high land and from Mud Lake was drained down into the lower portion of Mirror Lake area. If the ditches were not kept clean it remained there and flooded Woldson's land. If the ditches were cleaned out, and kept cleaned out, it would drain off so that the water would be about four feet or more below the surface of Woldson's land and it could therefore be cultivated.

As the commissioners proceeded to assess Woldson's land from year to year for maintenance taxes and did not maintain or drain the land, or keep the ditches cleaned out so that the water would drain off, he made demand upon them that they do so. Exhibit ____. The commissioners flatly refused to keep the ditches cleaned out, making various statements to him, namely, that others who had owned the land had lost it and he could do the same; also that his land was not worth draining, and also when they did do some work they made it clear that it was useless and of no effect.

Originally there was between two and three hundred acres of Woldson's land not drained. Whenever the ditch would be cleaned out water would drain off and more of the land would be put under cultivation. The land had been a slough or very shallow lake bottom and originally was very soft. There were hills around the land so that the water from the hills would seep down and come up all over the entire district, causing what is sometimes referred to as "springs". Along the foot of the hill a ditch was originally built. This was provided for by the original plans and specifications of the district, and is referred to as the "Rim Ditch". It was dug so that if it was cleaned out, and kept cleaned out, it would intercept the flow of the water down into the drainage district, carry it off into the lateral below most of Mr. Woldson's land. This lateral likewise was not cleaned out and the commissioners refused to clean it. One year the commissioners did some work along the main lateral ditch but did not clean it all out.

Mr. Woldson proceeded to do the balance of this particular work and *the result was that he was able to put under cultivation ninety acres more of the land.*

When the commissioners put on record a refusal to clean out the ditches and do the work, Mr. Woldson brought this action against them

to recover his damages therefor. One commissioner, John Davidson, refused to approve their action and voted against the same, so he was not made a party to the proceedings.

The complaint alleges the fact of the organization, diversity of citizenship, the filing of the assessment roll against this land, and that in the Mirror or Sproll's Lake area the assessment was $33,005.38, with a supplemental assessment of $6,460.05, and in the Frye Lake area the original assessment was $13,994.46, with an additional assessment of $15,332.50. Also that the number of lots had been changed by a resurvey effected by the district for the purpose of the assessment, but that the land of the plaintiff was exactly the same land as originally assessed.

The original order in the proceedings, to clean out, deepen and improve the ditches so as to effectively drain the land, was alleged in the complaint. The subsequent proceedings, where the various other orders were afterwards made against the commissioners, were also alleged. (Par. 5, p. 7.) These original proceedings were attached to the complaint as a part thereof. The decree of 1928 was also alleged. (Par. 6, pp. 8 and 9).

It was then alleged that a portion of the land was drained but that the balance was not, and that these two commissioners refused to do any

more work; that they notified the workmen who had been employed to do this work, to quit and that they would not get any money if they went ahead with the work, and that Bauman in every way tried to stop the cleaning out of these ditches. (Par. 11, page 12).

Mr. Woldson, in the early part of 1940, made application to the commissioners to clean out the ditches. At no time did Mr. Woldson ask for any change of the original plans or specifications. *All Mr. Woldson wanted or ever demanded was that the ditches be cleaned out as originally provided for.* When the commissioners advised that they would not clean out the ditches, Mr. Woldson notified them that if they would not do so he would and charge the same to the district. In 1940, at an expense of $1502.41, he did enough work so that ninety acres of land was reclaimed.

The commissioners imposed maintenance taxes on the land not drained in the sum of $1477.97. Had they drained it when it was requested Mr. Woldson would have had the entire 221.86 acres which was worth $10.00 per acre for its use, cropped, and he lost that much because of the refusal of the commissioners to drain said land, in addition to having lost the taxes on it. He also was put to the additional expense of $1502.41 for cleaning out the ditches so he could use one hundred acres.

During all of this time, although this land was never drained, the district had assessed and collected $4080.00 for maintenance purposes alone. The total amount of damage which plaintiff alleged against the defendants was $7049.93 and asks for judgment against them in that amount. A very remarkable answer was filed in the case, admitting part of the allegations and denying others, among other things alleging that Mr. Woldson was at one time the owner of some of the bonds of the district and as a bond holder had asked the court to order all the maintenance work done in the entire district. The court at that time refused to do so, reserving to him the right at any time to renew the motion. They then alleged that they put on record minutes stating that the plaintiff's land was not worth the cost of draining the same at the expense of the district, and that plaintiff's land could not be successfully drained, and that they would not spend any more money draining it. (Pages 42 and 43).

The commissioners admitted they told Mr. Woldson they would not clean out the ditches, page 42, the answer being:

> "Admit that they notified the plaintiff that they would not proceed with the draining of land and that they would not further clean out ditches on the land of the plaintiff, etc."

They admit that they had assessed and collected $4080.00 for maintenance purposes from this land and that it has not been drained so that it could be cultivated. They then set forth that certain land above plaintiff's land was higher than plaintiff's land and that the draining of the water off plaintiff's lands had made an exceptionally dry condition in the adjoining land; that said dry condition has lowered the water in the land adjoining the lands claimed to be owned by plaintiff to a depth of *sixteen feet below the* ground level of said lands, resulting in an exceptionally dry condition of said adjoining lands; that the adjoining lands are higher than plaintiff's land and that the natural drainage of said lands is towards the land of the plaintiff, and the effect of the increased lowering of the main ditch *has resulted in great damage to the adjacent lands whereas no beneficial results have been obtained for the lands claimed to be owned by the plaintiff.*

That is the gist of the defense in this case. Defendants Bauman and Copeland owns part of this land they say is being damaged.

In the answer, among other things, it is alleged that the plaintiff could have applied to the court to have new plans made for the lowering of the ditches through his land, etc., and that the same could have been heard and determined.

We repeat that the plaintiff does not want any change in the plans and specifications. He has never requested it; does not request it in this proceeding, and only asks that the ditches as installed—the district, and by the district be kept cleaned out so water can run through them and the land drained.

They also allege a large expenditure of money on ditches which they claimed were for plaintiff's benefit, but upon the hearing it was shown conclusively that this money was not expended for the benefit of the plaintiff but for all of the people in that section of the district, and the court denied the admission of that evidence.

The court made no findings of fact upon the issues involved. The findings of fact appear on pages 74 to 76, wherein it finds: (1) The diversity of citizenship and the amount involved; (2) that there has been considerable litigation regarding the drainage of this land, and when the defendants qualified; and (3) that the defendants have not been guilty of malfealsance, misfeasance or non-feasance in their conduct as commissioners and are not liable personally for mistakes or honest intentions or errors in judgment. That is a conclusion of law. Nowhere does it find what the facts are or what has been done by these commissioners, or what has not not been done by them, and the court, in render-

ing the opinion and deciding the case, decided it upon the question that in his opinion the commissioners had a discretion in cleaning out the ditches and in doing the work, or not doing the work, to drain the land as they in their opinion thought best. It is the plaintiff's contention that the statute and the law imposes an absolute, mandatory duty upon the defendants to clean out the ditches to the depth and the extent they were originally designed, and that they have no right to say that in their opinion the plaintiff's lands are not worth draining; neither do they have any right to say that the court erred in the various judgments and decrees entered, directing the commissioners to do this work.

It is a further contention of the plaintiff that the state court having adjudged that this work should be done, and having adjudged that the ditches should be cleaned out, and the assessments having been made upon that basis, that the right to have this done is res adjudicata and the defendants cannot defend upon a claim that they can exercise their judgment instead of following the decision of the court made upon hearings in the proceedings when the parties submitted the matter to the State court and secured a final and binding judgment in the matter.

EVIDENCE

In our opinion the evidence in this case is con-

clusive that the defendants did not do what the law requires them to do and keep the ditches cleaned out and drain this land, but wilfully refused to do so. The history of this district shows that this land was low and was not to be assessed until after it was reclaimed. The District originally was brought into existence in 1920. The decree approving the supplemental report affecting this particular land was not entered until August 20, 1924. Exhibit 17, pp. 215-255. This decree shows that it was entered on condition that the ditches be cleaned out and improved after objections had been made to it. Pages 253 and 254, where the decree specifically provides for cleaning out and deepening the ditches.

A stipulation had been entered into that this would be done and upon that stipuation the objections were overruled. The stipulation is set out on pages 213 and 214.

That decree was not complied with and in December the land owners sought to set aside the same because the ditches had not been cleaned out. Exhibit 17, pages 208-212. This petition was filed December 13, 1924.

On March 16, 1925, a stipulation was filed relative thereto. Exhibit 15, pages 194 to 197. An answer was filed March 7, 1925, Exhibit 15, pages 196 to 201. Findings of fact and conclusions

of law were entered on this, Exhibit 16, pages 202 to 207.

Neither of these orders were complied with. This appears in Exhibit 12, pages 171.

Notwithstanding all of these various orders and decrees made upon the hearings, the commissioners refused to do the work of cleaning out these ditches. Martin Woldson secured title to this land in 1932, and he appeared before the board many times trying to get them to clean out the ditches. Exhibit 4, page 115 (testimony of John Davidson); page 118, where he testified as to Woldson's appearance:

> "Q. How many times? A. Time and time again."

On page 312, in the testimony of Mr. Woldson, as follows:

> (Mr. Woldson "A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and in 1939 I believe they did more that year than they ever did at one time before."

He wrote the district various letters; Exhibit 4, pages 115-117 was written January 26th, 1940, in which he stated that from time to time he had written them about these conditions. In this letter he called attention to a new style pump that he thought could be purchased and used more

economically. This was afterwards done. At the time this letter was written the present defendants were the commissioners of that district. In May, 1940, he wrote the defendants, Exhibit 2, pages 109 to 111, calling attention to the fact that a resolution had been passed to exempt the land from assessments until it could be made subject to cultivation; that such was not done, and that he demanded that the maintenance work be done.

To this the commissioners replied by putting on their record a statement that to clean out the ditches would be more than the land was worth, etc. Exhibit 3, pages 112, 113. A few days later they notified Mr. Woldson they would not be reponsible for any expenses he incurred in cleaning out the ditches.

On September 14th he wrote them again calling attention to the fact that slides had occurred, the conditions had existed, and that something should be done. Exhibit 7, pages 129 to 131.

In November he sent them a copy of his statement. In the meantime, after Mr. Woldson write them the letter in January, 1940, they passed a resolution that no more work would be done in the Mirror Lake district. Mr. Davidson, secretary, testified as to the minutes, as follows:

"Q. The minutes of February 5, 1940, I call your attention to those minutes to which

a certain amendment was added, this amendment was offered by Mr. Bauman that the drainage District Number 1 would do no more work in Mirror Lake laterals from then on.

"A. It was made by Mr. Bauman.

"Q. What was done with that resolution?

"A. It was carried.

At their meeting on June 28th, 1938, an order was entered that the ditches be cleaned out, Davidson, page 125, testified:

"In 1938, calling your attention to the minutes of June 28, 1938, was the arrangement or the question of cleaning the ditches again taken up?

"A. It was ordered."

Mr. Woldson had had the matter of cleaning the ditches up with them since 1938 on down. Page 124. After the meeting of February 15th 1940, and in August, 1940, they apparently had a change of heart and they agreed to do the work if Woldson would cash the maintenance warrants:

"(Mr. Davidson) A. Yes the meeting of August 10, 1940, a letter from Mr. Woldson in regard to cleaning the main ditch was read. The same was ordered done provided Mr. Woldson would cash the 1941 maintenance warrants."

Mr. Woldson wrote them, calling attention to the water data from April 26th, 1939 to January 1, 1940. It shows that it took only six days to

pump all of the water out of Mirror Lake. Exhibit 6, pages 127, 128.

Bauman then agreed to clean out the ditches. He did not do so and in September, 1940, Mr. Woldson wrote him, Exhibit 7, page 129.

Mr. Woldson then proceeded to do the work himself and afterwards sent them the bill therefor, which appears as a part of Plaintiff's Exhibit 8.

Because of these slides and obstructions being in the ditches the water stood about bank full in the ditches. The ditches were shallow, running from a few feet through Woldson's land to about eight or nine feet at the sump which was a mile or two below Mr. Woldson's land. When Mr. Woldson cleaned out the ditches, the water level dropped 1½ to 2 feet, and because Mr. Woldson cleaned these ditches he was able to and did get plowed and in cultivation from 90 to 100 acres of land which produced good crops. (Pages 143, 135, 136, 264, 265, 269, 274, 275, 281, 282, 291, 292, 301, 302 and 325.)

Before they started to clean out these ditches they were all caved in, had weeds, cattails, and other debris in them. (Pages 259, 273, 274, 283, 289, 290, 275 and 315.)

The rim ditch was put in for the purpose of catching the water that seeped down from the

hills, carrying it off and delivering it below Woldson's land. (Pages 141, 142, 272, 276, and 300.) This rim ditch was filled up for many years, up until 1939 or 1940, when it was cleaned out for the first time. (Pages 276, 278, 289, 290, 300 and 315.) It would not carry water in the fall of 1939, page 296.

A. B. Ashby testified as follows, Page 383:

"If you allow the water to stand in them, do they fill up with muck and debris?

"A. That is right."

J. H. Cave, the engineer who built the district and who testified for the defendants, stated:

"Q. You even have to redig them and open them up so that the sun can get to them and harden the banks so that they will stand up.

"A. That is correct. * * * You see that stuff was just about like water.

"Q. It was slimy. A. Yes sir.

"Q. It takes a long time to get that to harden.

"A. Yes sir.

"Q. To solidify at all. Yes sir."

All of plaintiff's witnesses testified to the same condition, (Davidson, page 136. Pages 263, 315, 324, 325, 359 and 360.)

The water was not kept off this land at all until 1939. (Pages 335 and 336.

The land of Bauman and Copeland is above Woldson's land. The district comprises approximately 4400 acres, page 159. About half of the length of the large ditch, referred to as the main lateral, is above Woldson's land and drains into it. (Pages 159, 188, 333, 340, 406, 407, 157 and 158.)

Tules and weeds grow in the ditches and interfere with the drainage if not cleaned out. (Pages 257, 289, 290, 301, 274 and 314.)

These lateral ditches are dug by drag line and it is customary to clean them out yearly, especially where the ditch is shallow and the water fall slight, and the only way it can be done is by a dragline and using a clam shell where sheet piling or spiling have been driven. (Pages 157, 260, 262, 295, 296 and 297. The district owned a drag line, page 317.

If these ditches were not kept open they filled up and the water table rises, making the land soft and water stands on the land, as well as causes the ditches to slide in. (Page 156, 260, 273, and 283).

Woldson's land is practically level. The two defendants had land above the plaintiff and in the Answer claimed it was making their land too dry and gave that as one of the reasons they did not drain Woldson's land. Bauman made this statement to Mr. Morkelberg:

"Q. What did Mr. Bauman say? A. He said that by lowering this main ditch it would make it too dry in his part of the country. (Page 277).

Robert Nelson, page 284, testified:

"Q. Have you had any conversation with Mr. Bauman to the effect that the draining of this water would have on his land?

"A. Just talking this Summer and he said it would affect his higher land."

The Answer alleges substantially the same, pages 52 and 53:

"The effect of the increased lowering of the main ditch has resulted in great damage to the adjacent lands, etc."

If you do not remove the slides it keeps the water higher in the ditch and each of the slides hold the water up from eighteen inches to two feet. (Pages 257, 258, 273, 283, 294, and 300). When the slides are removed it lowers the water and the land dries out, page 274. None of the ditches through Mr. Woldson's land had been touched for many years until 1939. The so-called main lateral had been cleaned out at various times to his lands but at no time was it cleaned out through his land so that the water would flow. In the Fall of 1939 the district employed Mr. Farnum. Up until that time the dragline only went to where the ditch turned northeast and not beyond there, Page 312.

Mr. Farnum and Mr. Littlefield testified for the plaintiff and were both experienced dragline operators. Mr. Farnum cleaned out the main lateral clear from the booster pump about a half mile towards Bauman's place and then went around the main ditch and part of the laterals. The laterals were so sloughed in and filled up he could hardly find them and there had been no work done on them for years. Page 289. The rim ditch was not in a condition so it would carry any water. P. 290. He was hired by the district officers to do the work of cleaning out these ditches. While he was on it and as he started on the ditch towards the Great Northern Trestle, he was notified by Bauman that the district would not pay for any work beyond that trestle. PP. 293-295. As the ditches had not been cleaned out for many years, of course they would not stand up in many places, page 316. It was necessary to go through these ditches again the next spring and clean them out. Mr. Woldson wrote the commissioners and asked them to do the work and they positively refused. They now claim that they later did do some work, but by their own orders that was limited to two days time in working on the slides in the fall of 1940. Exhibit 35, Page 447. They refused to pay Farnum and the crew for the work that they had done and cut their bill almost in half. PP. 123.

Mr. Littlefield had been familiar with this district since 1929 or 1930 and he had worked there in the year 1938 or 1939 and again in 1940 and 1941. The work that had formerly been done was from the booster pump up to Bauman's in the main lateral, which was the only ditch that had been worked on in recent years. P. 257. He found the main ditch filled with slides and he removed them. PP. 257, 258 and 274. The main lateral running under the Great Northern Trestle was full of weeds and silt and he cleaned that out, P. 258. There were four dragline laterals in the district. They were two and a half to four feet deep and ten to twelve feet across. They had slides in them. PP. 274, 289 and 290. These slides, growth, etc., raised the water table and made the land wet, P. 273. The ditches also had lots of weeds growing in them. PP. 275, 260, 290, and 291. The slides were in the main laterals when he went there in 1940. He testified that it is a common thing to find slides in drainage districts and that it would be a proper thing to put sheet piling to keep out these slides as it would only take about three hundred feet for that kind of work, PP. 261 and 262; that there was seven or eight hundred feet of this kind of sheet piling near the outlet and on Bauman's land there is about two hundred feet of it. The main lateral is five or six miles long with a slight

fall. Mr. Littlefield gave as his opinion that sheet piling would take care of the slides. P. 264.

As soon as the work was done the land dried up and much more of it is formed and crops are growing on it. PP. 264, 265 and 275.

Littlefield worked for the district in 1940 but the district only cleaned out the main ditch, P. 266. The work for Woldson was on the laterals. He said you could shut off the slides by cribbing which is the same as sheet piling. P. 278.

Farnum testified, PP. 286 to 297, that he had run a dragline there in the years 1939 and 1941. In 1941 he was working for Mr. Woldson. The district hired him in 1938 and 1939. First he had to get the dragline and he then went around these various dragline ditches, P. 290.

He testified:

"Q. Could you state whether or not there had been work done in these ditches, from your experience?

"A. It had not been for several years.

"Q. What was the character of the growth in there?

"A. Cat-tails that had grown up there years before were laying there dead. * * *

"A. Plenty of all kinds of weeds.

"Q. In regard to the rim ditch what did you find there?

"A. It was sloughed in places. * * *

"A. It was not fit to carry water. It was sloughed in and had weed growth in it.

"Q. These lateral ditches, were they the same?

"A. Yes sir."

The witness testified he had started the work late in the fall, about the 25th of October. All parties agreed that the dry time of the year is the best to do the work, P. 291. When asked why, he said:

"The banks will turn out and stay lighter, they won't cave in so quick.

"If the water is drained out at that time what effect does it have on the bank?

"A. It stays drier and firm, it doesn't cave in so much."

He then testified that the land was not in condition to be farmed there, but when he was there in 1940 lots of it was being farmed. P. 291. When asked if any member of the board had told him not to go ahead with the work after he had been employed, he said:

"Mr. Bauman told me plainly after I turned a certain corner they would not pay any more of the expenses.

"Q. What corner was that? A. The bend up by the Great Northern track." P. 292.

He then testified that from his experience you could put in spiling; that he had driven lots of it and that there was lots of it in the district, and that it would cut off these slides, P. 293.

All the witnesses testified there was no dispute on the fact that the reasonable rental value of land was $10.00 per acre when the land had been drained, PP. 297, 298, 299 and 308.

Something was said about some spring holes in the district, but it was shown that they were common and that they were easily cut off and drained, P. 306.

Mr. Woldson had been a contractor all of his life, and he testified that the bill he submitted, Exhibit 20, was proper; that he had paid all the bills and that it was a necessary expense in doing this work, which he had done after the commissioners refused. He testified that Copeland gave his reason for refusing to drain the land as follows:

"A. He told me that that land was operated by Mr. Zimmerman and Mrs. Morrison and that they had lost everything they had put in it and there was no reason why I should do the same.

"Q. What did you say? A. I asked him if he thought it was fair to a man who paid his taxes that he should not have his land drained, he said that he had to please those that helped to promote him and to elect him commissioner." P. 320.

Neither Bauman nor Copeland denied the statements which witnesses said they had made. This land is the best land in the valley when drained, P. 323. Adjoining lands that have been drained produce excellent crops, justifying a rental of from $15.00 to $20.00 per acre.

Mr. Woldson testified that from his experience a few spiling would block these slides, P. 323, his answer being:

> "A. A man could drive a few spiling to take care of it the same as we did in the other place."

He testified the same condition existed on Bauman's land and it was done there. Besides that, in other places where it was bad they had put in pipe. The entire distance where these slides occur do not exceed three hundred feet, P. 324.

If the ditches were cleaned out in July and August the banks would harden and become staple, PP. 324 and 325, and it would only take a year or so of keeping the ditches cleaned out before they would stand up, PP. 325 and 326.

Something was said about Mr. Woldson being the original contractor but he took that on a unit basis and did the work as he has directed, P. 330.

Mr. Woldson asked the commissioners to either drain his land or cancel his assessments for the

maintenance of it, P. 331.

Bauman's land is higher than Mr. Woldson's land, P. 333.

In Woldson's opinion the water from the so-called springs is seepage from the foothills, P. 333.

Something was said about a new type pump that was put in in 1940. He wrote the commissioners, Exhibit 4, on January 26th, 1940, and suggested putting this pump in, which has worked very satisfactorily, as it is an automatic pump.

Exhibit 24 was a map drawn by J. H. Cave, the engineer for the district originally, and showed these main dragline laterals as having been originally projected for building in the district, and showed Mud Lake, PP. 355, 356. It was originally planned for pumping the Mirror Lake district. They knew at that time they had to wait until Mirror and Frye Lakes drained out before they put the ditches in and that it would be a mud bottom, PP. 358, 359.

Cave sustained the plaintiff's contention all the way through that Lateral 5, which is referred to as the Rim ditch, was put in to carry off the water from the foothills.

Mr. Cave further testified that during high water there is no drainage out of the district at the outlet. P. 362.

The commissioners were on the stand and made a very peculiar showing. Copeland stated that in his opinion 75% of all the maintenance in the district was spent in the Mirror Lake district, but when it was checked as to how much was spent they estimated $1,000. The trouble was he was trying to charge to Woldson's land all of the expense for draining this entire district, which takes in Sections 4, 5, 28, 33 and the South Half of 32, and drains about 3500 acres, PP. 406, 407, Plaintiff's Exhibit 24.

Defendant Copeland claimed they used the dragline in doing the work in 1940, but he admitted that they had limited the time to two days, PP. 410 and 411, and their resolution showed that such was the fact. Ex. 35-P, 447. They even admitted that it only takes a few slides of that kind to boost the water to the surface of the ground, PP. 410, 411 that the new pumps were put in the Winter of 1940 and 1941, PP. 411, 412; that he never had any experience with putting in sheet piling, never went over to see where the plowing on any of this land was being carried on or what its condition was, P. 414. He didn't even remember passing the resolution that the land was not worth the expense of drainage, P. 414. He said he was never there prior to the time the dragline was on it in 1940, and did not know if it was capable of being plowed or not, nor did he know how high the water stood in the

ditches before the dragline went through, PP. 414, 416. The drag line was not there until the Fall of 1940 and much of the land had been plowed there that Spring and Summer. He didn't even know the water had been getting lower since they started to open the ditches in 1939, and thought all the laterals had been cleaned out in 1939, P. 406. He was one of the commissioners who put on the record the fact that this ground was worthless.

Bauman's testimony was about the same. He did not know anything about this part of the district:

> "A. I have not been in the southern end any great extent only between the subway and where Oscar Davis goes into his place, that is very swampy." P. 419.

He was not over this in 1941, PP. 418, 419. He knew it had been a swamp before 1939. He admitted the rim ditch was there to catch the water coming down from the hills, P. 420. After the water drains down the main lateral to the sump they raise it eight or nine feet to get it into the main ditch.

ASSIGNMENTS OF ERROR

The appellant has designated in the appeal herein the points upon which he expected to rely being set forth as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, being the Assignments of

Error set forth, appearing on pages 85 to 91, inclusive, of the transcript of the record.

A number of the assignments of error can be grouped and argued together as the argument applying to any one of them will apply to all.

I.

Assignments of Errors 1, 3, 4, 6 and 7 can all be grouped together. These Assignments of Errors are on the ground that the appellees have failed to perform a statutory, duty imposed upon them by law, which is mandatory, and that therefore they are liable for the damages. The undisputed evidence shows that the ditches were not cleaned out and the land of plaintiff was not drained.

II.

Assignment of Error No. 2. This Assignment is based upon the claim that by the decrees of the state court, set forth in the evidence, it was adjudged that the owners of the land were entitled to have the ditches cleaned out and the land drained, and that said matter is res adjudicata, and therefore the plaintiff is entitled to a finding thereon in his favor.

III.

Assignments of Errors Nos. 5 and 15. These are based upon the claim that as the record shows, Woldson lost the use of this land for the

time complained of and that the undisputed evidence is that it was worth $10.00 per acre, and he is entitled to that as damages; that it shows he was required to pay maintenance assessments, and the defendants refused to maintain or drain his land, and he is entitled to recover the assessments paid which have been lost to him, and that as he was required to do the work himself in order to get the land drained, and thereby did drain approximately 100 acres of it, he is entitled to the money which he expended in reducing the damages, and which expenditure was for services the defendant should have performed.

IV.

Assignments of Errors Nos. 8, 9, 10 and 11, can be grouped together as they cover the same proposition, that the findings of fact are not such but are conclusions of law, and they are not sustained by either the evidence or the law.

V.

Assignments of Errors Nos. 12, 13 and 14, can all be grouped together as it is our contention that the court has failed and refused to find on the issues presented and that such constituted error.

Assignments of Errors Nos. 8, 9, 10, 11, 12 and 13 can be grouped under the following heading:

"The Court failed to find upon the facts in-

volved, and that the findings made were but conclusions of law, and if there is any finding of fact included therein, it is not sustained by any evidence. As this covers more than the two printed pages, they will be attached as Appendix No. 1 to this brief.

Summary of Assignments of Errors Nos. 8, 9, 10, 11, 12 and 13:

It is our contention that under the law of the United States the District Judge is required to find upon every issue involved. Rule 52A of District Courts, adopted by the United States Supreme Court, provides as follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts especially and state expressly the conclusions of law thereon, and direct the entry of the appropriate judgment, etc."

It is our contention in this case that the court failed and refused to make findings of fact. The appellant cannot be said to be derelict in this matter. We filed objections and exceptions to the proposed findings and set forth specifically the reason we not complain on, P. 70 to 84, inclusive. In that we asked for an oral hearing on the matter, P. 83. The objections were filed January 19, 1942, and summarily overruled by the court on the same day, and a hearing was refused the appellant.

The findings of fact in this case, in our opinion, do not constitute findings of fact and are not responsible to the issues involved. The findings of fact appear on pages 73 to 76, inclusive. The first finding is on Page 74, and it simply finds the jurisdictional matters. Finding of fact No. 2 does not find any of the facts involved, but does find that the defendants nor their bondsman are not liable for acts of omission or commission of defendants prior to the date of their qualification as commissioners of said district. Plaintiff has never contended that they were. On the other hand, all of our claim of damages was for matters happening since and we did not endeavor to prove any claim of damages prior to these defendants becoming officers or make any such claim.

Findings of Fact No. 3 in our opinion is not a finding of fact but is a conclusion of law. It finds that the defendants have not been guilty of any malfeasance, misfeasance or non-feasance in their conduct as commissioners, and that they are not personally liable for mistakes or honest intentions or errors in judgment. The court does not find what they did do or what they did not do. He concludes as a matter of law that they are not guilty of these acts but does not make a finding so that this court can pass upon the question as to what these parties did. In our opinion the court should have found the fact,

then made this conclusion of law from the facts found. The facts to be found were: Did the defendants drain this land? Did they keep the ditches open? Does the law require them to drain this land? Does the law require them to keep the ditches open? Upon finding these facts and finding of the conditions as they actually existed, then the court could make his conclusions thereon, but the trial judge has not furnished this court with any facts especially found and separately stated as required by this section of the rule. Dunn v. Trefry, 260 Fed. 147, First Circuit Court, where the court said as follows:

> "We recognize the rule that, where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, and the finding is a conclusion from admitted facts, we do not think the rule applies."

We believe, to begin with, that there is no evidence from which the conclusion can be sustained in this case. We further believe that the alleged facts are nothing but conclusions and the court has refused to find the facts, and that, therefore, the law had not been complied with. The rule quoted is very largely 28 USCA, Sec. 764.

Unquestionably, the intention was under this rule to require the court to make a specific find-

ing upon every question of fact raised. This case falls so far short that there is in reality no finding whatever.

The section referred to has been passed upon many times by the Federal Court. United States v. Stratton, 88 Fed. 54. In that case the court said:

> "From the statement given above of the proceedings in the court a quo, it will be seen that, while an attempt was made to comply with the proviscions of Section 7 above quoted, *yet there is no such specific finding of facts as to exhibit exactly the services for which the claimant asks compensation.*"

They then reversed the decision of the court below because of insufficiency of the finding of fact.

This is not new in this Circuit Court, but has long since been passed upon, United States v. Kelly, 89 Fed. 946, and the findings were very much more voluminous than here. The court says:

> "As has been seen, it is by section 7 of the act made the duty of the trial court to set forth the facts of the cause specifically in its findings, as well as its conclusions upon all of the questions of law involved. * * * The facts upon which the court concluded that the defendant in error was entitled to judgment against the plaintiff in error are not stated at all."

The court set forth what the findings would amount to but held they were insufficient and

reversed the case.

In this case, the issues raised were:

1. That the laws of the State of Idaho imposed certain duties upon commissioners of drainage districts, and

2. The court did not find whether these duties were imposed upon the parties or not. It just found the conclusion that they were not guilty of malfeasance, non-feasance, etc., nor were they liable for mistakes, etc. The court should have found what they did do and what they did not do.

We allege that the courts of Idaho had made specific findings and entered the decrees, adjudging that the owners of the land were entitled to have their land drained. The court found nothing on this at all. We allege that between certain times the land was not drained. The court found nothing on this at all. We made demand upon the commissioners and they refused to drain the land, and put on record a notice that they would not drain it. The court found nothing on this at all. It seems to us that it would be taking up the time of the court uselessly to follow this farther. If such a finding as this can support the issues involved herein, which are set forth in the general statement, then you might as well dispense with findings altogether, as these findings find nothing. If the

court had set forth the facts and then found the alleged findings as conclusions of law, there might have been some reason for it, but certainly there is none as findings of fact.

Under the old practice the court was not required to make special findings in all cases, particularly actions at law, USCA Title 28, Par. 773. Under that rule it was generally held that the court did not have to make special findings but that when it did make special findings it had to make a finding upon every question involved. Where a finding is required and it is not in the record, the case will be reversed. Packer v. Whittier, 1st Circuit, 91 Fed. 511. There are many other cases upon this question, but those rules are old and well established. Rule 52, subdivision A, was enacted to require the findings, does require the findings, and where the findings have not been made requires a reversal. In this case the findings have not been made and therefore the case should be reversed.

O'Brien's Manual Fed. Appellate Procedure, Third Ed., P. 17.

Assignment of Error No. 2, is as follows:

> The Court erred in making said decree for the reason that the undisputed evidence in said cause shows that by the decree of the District Court of the Eighth Judicial District of the State of Idaho, in and for Boundary County, judgments and decrees were duly entered re-

quiring the land of the plaintiff to be drained and requiring the Commissioners of Drainage District No. 1 to do whatever was necessary to drain said land and that said Commissioners failed, neglected and refused to do so."

This Assignment of Error is simply the age old and oft decided principle that where a court of competent jurisdiction has once passed upon the question and decided it, it is forever at rest and can never be raised in any other court at any time or place.

The Idaho Codes provide fo rthe organization of drainage districts, Sec. 41-2501 to Sec. 41-2609, inclusive. The corporate powers given to the officers are as follows:

"Sec. 41-2501.—Any portion of a county requiring drainage or diking, or both, may be organized into a drainage district, and when so organized such district and the board of commissioners hereinafter provided for shall have and possess the power *herein conferred by law upon such district and board of commissioners, etc.*"

The act then provides fo rthe filing of a petition for the organization, Sec. 41-2505; provides for the filing of objections upon the the hearing, Sec. 41-2508; provides for the decree organizing the district, Sec. 41-2509; provides for the appointment of commissioners, Sec. 41-2510; provides for the appraisement of the benefits and damages, Sec. 41-2514; provides for changes being made in the plans upon application of the

petitioners and the hearings thereon, Sec. 41-2517, 41-2518; provides for objections and hearings thereon, Sec. 41-2520, and provides for the confirmation of the hearing and for findings and decree thereon. This provision is as follows:

> "41-2522. FINDINGS AND DECREE.—If the findings be awarded against the validity of the proceedings the same may be dismissed. If the findings be in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, *and the order of confirmation shall be final and conclusive, the proposed work shall be established and authorized and the proposed assessments approved subject to the right of appeal to the Supreme Court.*"

The act then provides for a supplemental report, Sec. 41-2523; provides for an appeal to the Supreme court, Sec. 41-2524; provides for additional levies made i nthe same manner as the first, Sec. 41-2530, and provides that the assessments may be contestable, Sec. 41-2534.

The assessment roll being final, becomes a lien on the property, Sec. 41-2535.

The assessments are entered as tax liens, Sec. 41-2536.

The law then provides for the duties of the officers, Sec. 41-2539, as follows:

"All drainage districts organized under the

> provisions of this chapter shall have the right of eminent domain, * * * to build and maintain drains, canals, sluices, bulkheads, water gates, levees and embankments; *to establish and maintain pumping plants and to construct and maintain and keep in repair all works requisite and necessary to the end that the lands in the district may be reclaimed.*

It then provides for enlarging other works, removing natural obstructions, and doing whatever is necessary to construct the works. It provides that if there is a change in the premises it must be presented to the District Court, Sec. 41-2543, which provides as follows:

> "In case any substantial changes in said system of improvement, *or the manner and construction thereof, shall be deemed necessary by said board of commissioners* at any time during the progress thereof, and the written consent to such changes can not be procured from said landowners, then said commissioners for and on behalf of said district, shall file a petition in the district court of the county within which said district is located, setting forth therein the changes which they deem necessary to be made in the plans or manner of the construction of said improvement, and praying therein to be permitted to make such changes, etc."

It then provides for giving notice for a hearing thereon.

As before stated, when the original drainage was undertaken part of the land was swamp land and somewhat submerged, consisting of

three minor lakes, namely, Mirror, Frye and Mud Lakes. Until these were unwatered the exact condition would not be known, but the engineer made soundings and laid out a general plan. These lands were not assessed until after they were unwatered, and in 1940 the commissioners' supplemental report was submitted. At that time the landowners owning this property filed objections to this report on the ground that their land had not been drained. This objection was filed on the 16th of August, 1924, and on the 20th day of August, 1924, a stipulation was entered into, stipulating that the commissioners would within a reasonable time clean out the ditches on the property now involved. This stipulation is set forth on page 214.

After stipulating these facts, the objections to the supplemental report were withdrawn. This stipulation provides:

> "That in the decree to be entered herein, there shall be inserted an order to be made by the court, directing the Commissioners to clean out, deepen, and improve the drainage ditch as now constructed within a reasonable time, to provide for the suitable and sufficient drainage of the land of said objectors, covered by the objections filed herein."

Thereupon the decree confirming the supplemental report was entered and appears on pages 215 to 255 of the record. That decree conformed

with the stipulation and beginning on page 253, it provides:

> "It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitable and effectively drain the land of the objectors, to-wit: (They then described the land, of which the land in controversy is a part.)

This order was not complied with.

On the following December 13th the same objectors filed a petition for an order to show cause to vacate this decree because it had not been complied with, Plaintiff's Exhibit 17, PP. 208 to 213 of the Record. Thereupon the Drainage District filed its answer. It appears on pages 197 to 201, inclusive. This answer admits all of the facts of the petition. They then allege that they did not complete the drainage of the land by reason of obstructions having formed in the drainage ditch between the lands of the objectors and the outlet of said ditch. They then allege that they had employed an engineer to survey the land and that he had made a report that the only thing to do in order to completely drain the land of the objectors is that the entire ditch, from its outlet throughout its enire length, be cleaned out and the obstructions removed, and the Commissioners then alleged that that would be done and that all of this work was properly

chargeable to the District as maintenance, and not a proper charge against any portion of the land within said District as an additional assessment.

Thereupon, they made another stipulation, Plaintiff's Exhibit 15, pp. 194 to 197. The owners of the land and the District stipulated that the land would be drained and that the obstructions caused by the caving of the banks so that the ditches were not as deep as called for caused the trouble and that laterals which the Commissioners had recommended, would be built. Upon this being heard the court made full findings of fact, conclusions of law, and decree, Exhibit 16, PP. 202 to 207, exclusive, wherein the court found that the commissioners should, as an item chargeable to the district, and as maintenance,

> "proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, * * *"

It is our contention that these three decrees, having been made, are conclusive, and in any and all proceedings thereafter taken they are binding upon the district and all of its commissioners, as well as upon the land owners.

It is further our contention that if any party wants to make any change in this district system they must do so in the manner provided by statute, and until such is done those decrees delineate and determine the rights of all parties,

and the commissioners are bound to take that as the law and their authority, and act accordingly. If they can refuse to clean out the ditches and keep them cleaned out, they can refuse to drain the land. If the commissioners can refuse to drain the land, then they are taking the landowner's property without due process of law. They assessed this land at all times and all assessments against it were paid. Yet at no time did they ever drain it.

After Martin Woldson became the owner of the land he met with the commissioners a number of times and they promised him that until they did drain the land they would not charge any maintenance taxes to it, but they continued to assess this land. In 1938 and 1939 he had to pay the maintenance taxes for back years to keep the land from going to tax deed. He thereupon demanded of the commissioners that they proceed to clean out these ditches as required by the orders of the court. He asked for no change whatever, only that the ditches which were there, be cleaned out and kept cleaned out.

The commissioners now set up that they have the right to exercise their judgment as to whether the land should be drained or not. Our answer to that is twofold: first, by the decree heretofore entered they are bound, and second, by the laws of the State of Idaho, they have no

right to refuse to clean out or maintain the ditches in the district, but it is their mandatory duty to keep them cleaned out at all times.

The record shows that Mr. Woldson appeared before the board many times, In 1938 or 1939 they agreed to clean out the ditches and started Mr. Farnum doing that work. While he was doing the work the defendant Bauman came to him and told him that when he turned a certain direction to go onto Woldson's land to clean out some of the ditches the district had built to drain these lands, that he must stop there and not do any of that work or he would not be paid. However, as he had been instructed to clean out the ditches he proceeded to do the work. He found the ditches caved in, filled up, full of growth, silt, etc., as the water had stood bank full and they had not been cleaned for years. Naturally there were some slides that came back in the ditches when he was stopped after partially cleaning them out. The next Spring Mr. Woldson called the district's attention to this fact and they positively refused to clean them out. He then made a further written demand upon them and notified them that if they would not clean out the ditches, and drain his land, he would proceed to do so and charge the cost to them, and they notified him they would not pay a cent. It was then too late to get them cleaned out for a full crop that yealr.

Mr. Woldson started this work and after spending about $1500 removing the obstructions so that the water dropped about two feet. The slides in the ditches had kept the water table up so that it kept the land soft, but when the water dropped Mr. Woldson was able to plow ninety to a hundred acres and put it in crop, upon which last year a heavy crop was grown.

Bauman made the statement that they had spent more on the land than it was worth.

During all of this time the bond assessments and bond interest had been paid so that the district had collected the enormous sum of $119.75 per acre from the owners of this land, yet they did not drain it or reclaim it and have positively refused to do so.

It is our contention that the various decrees referred to settled the rights of the parties and that when the case comes into this court the only thing this court will consider is whether or not the decrees were made, and if so, this court will not go behind it as it is res adjudicata, and the court accepts it as such. We think this rule of the law is applicable to all forms of judgments and concludes all parties connected with the controversy.

The judgment of a court of competent jurisdiction, so long as the same is unreversed, is conclusive on all persons involved as to the issues pre-

sented by the pleadings and passed upon by the court, Elliott v. Porter, 6 Idaho 284, 59 Pac. 360. Quoting from the decision, it is said:

> "A judgment of a proper court, being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, ever afterward, as long as it shall remain in force and unreversed. * * * A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness."

Applied to this case these orders and decree are binding upon the District Court and all of the commissioners ever afterwards, and are also likewise binding upon the landowners.

Richardson v. Ruddy, 15 Idaho 488, 98 P. 842, where the court held that if the court had jurisdiction, whether it had made an error or not, the judgment is binding upon all parties.

Village of Heyburn v. Security Savings & Trust Company, 55 Idaho 732, 49 P. (2d) 258, the court again said:

> "Judgment of the proper court puts an end to all further litigation on account of same matter, and becomes the law of the case,

> which cannot be changed or altered, even by consent of parties, and is not only binding on them, but on courts and juries, ever afterwards, as long as it shall remain in force and unreversed."

They even went so far as to hold that it not only was binding as to matters decided but as to all matters that should have ben decided in that case. Ex Parte Moran, 144 Federal 594, on page 603 and following, where appellant raised questions which the court held would perhaps have been error had they been presented in time, but said the courts may have decided it wrong but that was not material if they had jurisdiction to pass upon the question that was settled, and stated as follows:

> "That court had ample authority to determine whether or not their indictment should be received and whether or not the petitioner should be tried upon it. Its action may have been erroneous, its decisions of these questions may have been wrong, but they fell far within the lawful limits of its jurisdiction and they were not violative of the Constitution. * * *
>
> "As it does not appear in the case in hand that the district court of Comanche county was ever without jurisdiction of the case or the person of the petitioner nor that it exceeded its jurisdiction in the conduct of the proceedings which resulted in his imprisonment nor that it in any way violated the Constitution of the United States, etc."

They denied the writ.

This court, in a comparatively recent case, de-

cided the same question, Lineker v. Marshall, 7 Fed. (2d) 875, where the court said:

> "United States Circuit Court of Appeals is not a court of appeal authorized to correct judicial errors charged against state court.
>
> "A right, question, or fact distinctly put in issue and directly determined by court of competent jurisdiction as ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if such suit be for a different cause of action."

In this case the court said:

> "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * Such claim or demand, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

They then cited various other cases which are conclusive on the matter, and we submit that in this proceeding the District Court erred in not accepting the three decrees of the state court as absolutely conclusive, as by those decrees the owners of the land in controversy were adjudged the right which Martin Woldson contends for, and these commissioners wrongfully refused to do their duty and give him that to which he was entitled.

Asher v. Bone, 100 Fed. (2d) 315, 9th CCA, is direct to point. That was a case where the decree of the Probate Court was in controversy. It was claimed that the Probate Court had erroneously decided a certain matter, but the court said:

> "It is not for Circuit Court of Appeals to determine that Idaho probate court erroneously interpreted will and to correct such error, as jurisdiction to determine interests of claimants of decedent's estate in such state is exclusively in probate courts thereof, and *such court's determination, whether right or wrong, is conclusive and subject only to be reversed, set aside, or modified on appeal.*"

Certainly this same rule applies in a greater degree to a District Court which under the Idaho Constitution is the court of general jurisdiction to hear and determine all these matters.

Assignment of Error No. 1:

> "The District Court of the United States for the District of Idaho, Northern Division, erred in making and entering the judgment and decree in said cause for the reason that said judgment and decree is contrary to the law."

Assignment of Error No. 3:

> "The Court erred in making said decree as the undisputed evidence shows that the plaintiff made written demand upon the defendants to drain said land and they refused to do so and failed, neglected and refused to perform their mandatory duty of keeping the drainage ditches constructed on said land for

the purpose of draining the same, and keep the ditches cleaned out so that the water would flow through the same and thereby the damage complained of was caused."

Assignment of Error No. 4:

"The court erred in making said judgment and decree as the undisputed evidence shows that certain ditches referred to as laterals and main drag line ditches were laid out by said District as part of the original plan for draining the same, approved by the District Court of the Eighth Judicial District of the State of Idaho, in and for the county of Boundary, in proceedings duly had for that purpose under which judgment and decree it became the mandatory duty of the Commissioners of said Drainage District to keep said ditches in proper condition and repair and to maintain the same so that the water would flow through the same. That said commissioners refused to do so and that upon demand the defendant commissioners refused to do said work and that because thereof plaintiff's land was not drained."

Assignment of Error No. 5:

"The Court erred in making said judgment and decree as the undisputed evidence shows that the plaintiff has suffered the damage complained of in his complaint because of the refusal of said defendants to perform their mandatory duty of keeping said ditches in proper condition and repair."

Assignment of Error No. 6:

"The Court erred in entering said decree as the undisputed evidence shows that said defendant commissianers have failed and posi-

tively refused to perform said duty and refused to allow said ditches to be cleaned out and that said refusal was wilful and intentionally done on their part and that under the law the defendant commissioners have no right to refuse to perform said duty and that if they deemed the work to be improper or that it should not be done it is their duty to apply to the District Court for authority to change the plans, under which condition the land owner may be heard and his rights decided by the Court of competent jurisdiction.

Assignment of Error No. 7:

"The Court erred in entering said decree as the undisputed evidence shows that the plaintiff and his predecessors in interest, have paid all of the assessments levied against said land by the District and that they are entitled to have the ditches cleaned out and maintained."

Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7 can be grouped and argued together. Some of the authorities before cited in the brief will also be applicable to this, but in addition thereto the following, showing the individual liability of such officers, is applicable:

The commissioners are personally liable for their failure and neglect of duty to anyone who has suffered thereby, and mistake or honest intention is no excuse. The court seemed to be going upon the theory that if these parties honestly thought they did not have to perform their duties, they could violate the law, impose a seri-

ous loss upon the plaintiff, and be relieved from liability by claiming some official sanctity. That is not and never has been the rule of law where a public officer was performing a duty under which he owed a direct obligation to an individual. Amy v. Barholder, 11 Wallace 136; 20 L. Ed. 101, where the court said:

> "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. *A mistake as to his duty and honest intentions will not excuse the offender.*"

Proper v. Sutter Drainage District, 200 Pac. 664. Under the California Drainage District Act the districts were not liable, but the court held the commissioners liable for misfeasance in office, stating the rule as follows:

> "One acting in his official capacity is individually liable for the negligent discharge of his duties."

This is sustained in Idaho.

State v. American Surety Co., 26 Idaho 652; 154 P. 1097;

State v. Title G. & S. Co., 27 Idaho 752; 152 P. 189;

Strickfadden v. Greencreek Highway Co., 42 Idaho 738; 248 P. 456

Payne v. Baehr, 95 P. 895.

In Payne v. Baehr, 95 P. 895, the court laid down the rule as follows:

> "A public officer is liable to respond in damages to one specially injured by his negligence or refusal to perform a ministerial duty to the extent of such special injury."

Gutschenritter v. Whitmore, 139 N. W. 567:

> "A public officer is liable to one injured from his acts with respect to a ministerial duty, whether of nonfeasance, misfeasance, or malfeasance."

Hupe v. Sommer, 129 P. 136, where it was necessary for an officer to pass on a claim so it could be presented for payment, and he would not do so, the court said:

> "If the defendant without sufficient excuse refused to perform them, he inflicted a wrong upon the plaintiff, and should be liable for whatever loss was thereby occasioned."

Tholkes v. Decock, 147 N. W. 648:

> "Public officers are answerable to private persons for injuries resulting from the negligent performance of their ministerial duties."

Leary v. Board of Drainage Commissioners, 89 S. E. 803;

Bice v. Brown, 167 Pac. 1097.

In the case of Croft v. Millard County Drainage Dist., 202 P. 539, the court of Utah says:

> "Furthermore, if the drainage district is liable for the wrongs complained of, it is difficult to see upon what principle its officers

and agents, by whom the wrongs were perpetrated, can be held immune from responsibility."

Perkins v. Blauth, 127 P. 50.

"The bond is also liable."

Thompson v. Hughes, 121 N. E. 387;

People v. Brown, 111 N. E. 557;

State v. Hundley, 87 So. 890;

Leary v. Board of Drainage Commissioners, 89 S. E. 803.

The court having ordered this work done and having entered a decree against the district to do the work, it is our contention that the district officials had nothing but a ministerial duty to do and perform the work. County commissioners and all officers of such districts in Idaho can only do what the law requires them to do. They cannot exercise independent judgment and there is no discretion in them. These districts are organized only upon the theory of a special improvement and the party who pays his money is to get the benefits thereof, Booth vs. C. A. Groves, et al, 43 Idaho 703, 255 Pac. 637; Burt, et al, v. Farmers' Co-op. Irrigation Co., Ltd., 30 Idaho 752.

Section 41-2536 of Idaho Codes, imposes upon the commissioners an absolute requirement to do this work. That is the limitation and extent of their authority.

In Gorman v. Board of Commissioners of

Boise County, 1 Idaho 553, on page 556, the court said, as to a board of county commissioners, which are a much higher type of board than a drainage district, as the latter is the lowest form of corporation known to the law:

> "A board of county commissioners is a tribunal created by statute with limited jurisdiction and only quasi judicial powers, and cannot proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that required or provided by statute. *The statute is its guide, and a strict adherence to it is as essential as that of the mariner to his compass.* The whole tenor of the text-books and the authorities is to this effect. There is and can be no safety in any other rule. Men's rights cannot be defeated by the mere discretion of such an inferior tribunal, and not even by one of much more extended jurisdiction. Leave, when once given, to go outside of the statute and make rules and regulations to govern in such cases, would be very dangerous, not only to the letter but to the spirit of the law."

Prothero v. Board of County Commissioners, 22 Idaho 598:

> "The board of county commissioners has only such powers as are expressly or impliedly conferred upon it by statute."

Corker v. Commissioners of Elmore County, 10 Idaho 255:

> "A board of county commissioners has neither express nor implied power to accept the resig-

nation of a bidder to whom they have duly and regularly awarded a contract under Section 875, Revised Statuted * * * for the care, keeping and repair of the roads of a contract road district."

Johnson v. Young, 53 Idaho 271, on page 285, where on a rehearing they confirmed the rule laid down in the case of Gorman v. County Commissioners, I Ida. 553, supra.

Vol. 2, McQuillin Municipal Corporations, Sec. 499, the rule is laid down as follows:

"As heretofore stated, the powers of the municipal corporation are derived from the charter or act of incorporation, and, hence, its officers may only perform such duties as are prescribed therein or by legislative act applicable, or which may be implied, or which are indispensable, in order to enable the corporation to perform the purposes of its creation. *In the discharge of their duties the officers cannot go beyond the law, nor delegate their powers, wherein judgment and discretion must be exercised.* These rules are firmly established and enforced uniformly by the courts."

In Idaho irrigation districts are the lowest form of corporations known, Breckenridge v. Johnston, 108 P. (2d) 833, where the court said:

"Drainage districts are special improvement districts of limited liability. * * *

"The functons of a drainage district are business and economic, rather than political or governmental."

In addition to the above it is said:

> "No question of taxation for governmental purposes or for the maintenance of governmental functions is involved. *Assessments are made in proportion to the benefits received and are intended primarily to serve and advance the proprietary interests of the land owners within the district.*"

This being so the commissioners must look to the statute to give them authority to exercise their own judgment as to whether land should be drained or not. It cannot be found in the decree confirming the assessment, and as a condition to allow it to be placed against this land the court ordered the district to

> "Within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit: (Then follows a description of the land in controversy.)"

In the last hearing the court entered his decree and findings, and in the findings found that the objectors, then the owners of this land, were entitled to have these ditches cleaned out and kept cleaned out to the original depth, PP. 202, 205. By the decree it provided that the Commissioners of the district

> "Be and they are hereby instructed to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof *and maintain said ditch*

to said original level, construct such laterals as may be required, etc."

By the last decree he again ordered:

"The Commissioners are Further Ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes." P. 172.

He also provided for placing a pump at a certain place, and said:

"And cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as now constructed, etc."

That was just imposing on the commissioners what the statute provides for. Sec. 41-2539 requires the drainage district to

"build and maintain drains, etc., * * * to the end that the land in the district may be reclaimed."

It nowhere, at no place, intimates that they have any discretion in the matter whatsoever, and we most earnestly submit that as the court, having full jurisdiction, three times decided this question and ordered this work done, such decrees and orders are conclusive, binding on the district and the commissioners, the landowners and all

courts, and as these decrees require the work be done and as the statute requires the work be done, the commissioners had no discretion and it was their imperative, mandatory duty to do this, the failure of which subjects them to liability, especially as the "failure" was brought about by their personal interest.

Assignment of Error No. XIV:

> "The Court erred in failing to find that said defendants had failed, neglected and refused to perform their duties as Commissioners of Drainage District No. 1 and keep the drainage ditches cleaned out and open so that the water would flow through the same and said fact is conclusively shown by the evidence in this case.

NO DISCRETION IN COMMISSIONERS BUT MANDATORY AND MINISTERIAL DUTY TO KEEP DITCHES OPEN.

In addition to the statute quoted the following authorities are decisive on this question.

County v. Drainage Dist. No. 1, 139 N. W. 649, where the law made it the duty to take care of highways where they crossed ditches. The court held there was no discretion in the matter.

Stoddard v. Keeke, 116 N. E. 193, where the court said:

> "Under Farm Drainage Act, par. 17 and 41 (Hurd's Rev. St. 1915-16 * * *), the duty of the commissioners is to construct a sufficient drain to afford ample drainage for all of the

lands in the district which have been assessed, and it is not discharged by construction of a ditch once adequate which later becomes inadequate and causes damage to land. * * * The provisions of such sections are mandatory."

This general rule is applied to all manner of actions of the commissioners of these districts:

19 C. J. 700, par. 191:

"It is the duty of the drain commissioners, county surveyor, or other officer designated by statute to see that public drains are cleaned out and kept open and in proper repairs. * * * The officer having supervision of the drain may generally act upon his own initiative when he is satisfied that the repairs are needed, and his action is not dependent upon the filing of a petition or the giving of notice to persons interested or affected."

People v. Commissioners, 22 N. E. 596, where the court said:

"In the statute before us it is clear that a duty is imposed upon public officers, and that the rights and interests both of the public and of third persons are involved, and that they have a claim as matter of right that the highway commissioners should exercise the power given them, and the duty devolved upon them of keeping the public road clear and free from fences or other obstructions that render it impossible to travel thereon. * * * The duty on them to act is imperative, and the discretion given them is merely in respect to a matter which is incidental to the performance of such duty."

Peotone & Manteno Union Drainage Dist. v. Adams, 45 N. S. 266. There the court said:

"Under the section of the statute supra, *where an error has been committed,* can the drainage commissioners shield themselves behind what they term a 'discretionary power,' and thus leave the landowner without any remedy whatever? If they could, the law ought to be repealed at once, in order to prevent others from being imposed upon by its unjust provisions. But we think the statute gives a negative answer to the inquiry. The statute nowhere says that a discretion exists where a wrong has been committed on one of the landowners, but, on the other hand, it says that they shall use the corporate funds of the district to carry out the original purpose, to the end that all lands shall receive their proper benefits, as contemplated when the lands were classified. Under these two sections of the statute, we do not think any discretion is vested in the commissioners, but, on the other hand(the duty enjoined is imperative. * * * High, in his work on Extra-ordinary Legal Remedies (section 413), says: 'Where by act of the legislature, the duty is plainly and imperatively incumbent upon the common council of a city to make certain street improvements, the writ will issue for the enforcement of the obligations.''

Under the Idaho statute there is no intimation even that the commissioners are to be given any discretion. The plan must be submitted when the district is in its formative period. The parties have a hearing on the plan as submitted. The court approves the plan as submitted. The court orders the work done and the assessments made on the plan as submitted. It would be a stretch of

all human imagination to even think that any legislature after providing just how the thing should be done would thereby imply that if the commissioners did not like it they could refuse to do it, or do it in some altogether different manner. In other words if the condition that has arisen here can be carried out then one can have his land and his money taken from him by the action of these commissioners absolutely contrary to the law and contrary to the decisions of the court.

Thompson v. Hughes, 121 N. E. 387, where the Supreme Court of Illinois laid down the rule as follows:

> "The duties of commissioners do not end with the completion of the original system, and if found defective they must remedy the defect *and maintain the drains and ditches,* and if they fail to keep them in repair they are liable to a penalty, and the landowner has a remedy by mandamus to compel them to perform their duty. * * * They are also liable for damages caused to an owner of land which has been assessed for the system of drainage for neglect of their duties. (Reciting instruction requested). It was said that under the Levee Act (Hurd's Rev. St. 1917, c. 42) the obligation and power of the commissioners are the same as under the Farm Drainage Act, and a positive duty was imposed upon the commissioners to afford proper drainage to land which had been assessed. * * * The duty declared by statute is specific, and the performance of it is not discretionary, although

> the commissioners have a discretionary power to determine the system of drainage and in regard to the location and drains and the details of the work."

That is exactly our position here. The commissioners here unquestionably had the right to say whether they will keep the ditches cleaned out until the banks stood up, or putting in spiling, or digging around the slides or to do any work in the detail of draining the land. They have a right to say whether they will clean them out with the drag line or by hand and of these various things the owner cannot complain, but they have no right whatsoever to refuse to clean out the ditches.

Again in this case they are taking the water from the higher land and throwing it onto Woldson's land and refuse to remove it. They have no right to do that.

Leary v. Board of Drainage Commissioners, 89 S. E. 803:

> "It is true that the drainage district is a quasi public corporation. * * * But it is not a governmental agency, and occupies the same relative position as a railroad company, or any similar quasi public corporation created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit. * * * We are also of opinion that though no bad faith or malice on the part of the commissioners individually is indicated in the evidence, they

> are individually liable because there was no legal authority for them to extend their canal beyond the limits of the district in such a manner as to divert the water upon the lands of the plaintiffs to their detriment. * * * But they are not exempt from liability for their torts or contracts. And the commissioners, as their agents, are individually liable if they act illegally or negligently, so as to injure others outside of the district."

Here this rule should apply with all of its force and effect. In Idaho drainage districts are not even given the standing of quasi public corporations.

Breckenridge v. Johnston, 108 Pac. (2) 833. There they were simply business corporations for special improvements and of limited liability. Here the two commissioners responsible for these actions are interested parties.

Exhibit 1 on page 109 of the record is the schedule of the assessments levied against this land from 1924 to 1927 and on page 104 the levies for 1938, 1939 and 1940 are given. The record shows that the land was assessed at $47.5016 an acre and from the amount of land in the district it shows that $119.75 per acre already has been levied on this land, *collected and the land not drained.* On this 220 acres of land there has been $26,389 already levied and collected. Who got the benefit of this? The other landowners in the district. Bauman got spiling

through his land to prevent sloughing through there. He refuses to even permit Woldson's to be drained. The record is conclusive on the fact that these commissioners have refused to drain this land and will not and do not intend to do so. Plaintiff's Exhibit No. 3. At the meeting where they passed that resolution he declared "that it would be a waste of money, etc.,"

> "A. Mr. Bauman said that we had spent more money than that land was worth." P. 179.

Again calling Bauman's attention to the statements in Exhibit 3, that this reclamation could not be accomplished and would be a waste of money, he was asked:

> "Q. That was your opinion? A. Yes sir.
>
> "Q. That is the position you took? A. That was just the way we felt.
>
> "Q. And for that reason you did not do anything further towards reclaiming it, did you?
>
> "A. That was a good reason."

In view of the fact that the same year Woldson spent $1500.00, causing the water to drop two feet and got 90 acres of the 220 plowed, and that the additional slides caused by the wet, soggy banks, began to again fill up the ditch so that it lacked from 1½ to 2 feet of letting the water drain out, goes to show beyond any question that when the slides are removed and the ditches kept cleaned the water will drain out of

this area into the sump, and instead of standing close to or on the surface of Woldson's land, making it soggy so it cannot be cultivated, the water will stand from 3 to 4 feet below the surface, making the land tillable and, as testified to, the best land in the district. All of which goes to show that there was no merit whatever in the commissioners' contention, and again goes to show the reason why they have no right to arbitrarily set up their own opinions as against the orders organizing the district, directing the reclamation, and the three distinct orders finding that the land would be drained, and ordering it drained, entered when the matters were actually heard in court.

There was considerable talk by the commissioners about the work done in 1940, but when we got down to what they had actually done we found they had directed the slides to be cleaned out and limited the work at not to exceed two 8-hour days, Exhibit 35, P. 447.

We found that after Mr. Woldson had notified them he would have to go ahead and do the work, these two commissioners stated they would not be responsible for anything of that kind, Exhibit 22, P. 21. Bauman told some parties, including the witness Morkelberg, and the witness Nelson, and put in the answer, that it was doing damage to the high lands to drain this low land.

His actions are personal and he is refusing to do his duty because he personally thinks his land is going to suffer. The record shows that they never made any real investigation of this end of the district whatever and when asked about it did not know anything about how much of it was being plowed, how much of it was in crop, what had been done on the ditches or little of anything else. Even the defendant Copeland said he thought that all of the ditches had been cleaned out in 1939 whereas, as a matter of fact they had refused to pay Farnum for doing the work on only part of the ditches, and he was one of the commissioners who voted against making the payment. If a commissioner can accept a position of public office then say that he will let his own personal interests control and that other persons who have land in that district cannot have their land drained because he is personally afraid that it will hurt him, then he should be ousted from office. He was not selected as commissioner of the district to look after his personal interest but to do that which the law required him as commissioner to do, namely, to have all of the land in the district drained. There is no showing in the record that the drainage would hurt Bauman's land but there is a showing that he positively has refused to do his duty because he thinks such will be done. For a small sum they could crib out these slides on this ditch

with spiling or plank driven in the ground and it has been done in other parts of the district but they even refuse to do that. As an example of how little they know what they were doing, Bauman testified that in cleaning out the ditches in 1940 and 1941 they had spent half the maintenance fund in that district, P. 422-424. He finally admitted that included more than one-half the drainage ditch and drained more than half of the district, but when we got him down to how much that 50% was, he testified:

"Q. Do you know how much you spent?

A. In cleaning out the ditches in 1941 I do.

Q. How much?

A. A thousand dollars."

It was then shown that their maintenance that year was 4½% and that the total valuation for assessment purposes of the district was $204,000, making over $9,000 maintenance fund which they raised and only $1,000 spent on the Mirror Lake area. His maintenance tax that year would have been about ½ the amount they spent in the whole 2200 acres. But that is not altogether the criterion because this land had been soaked with water for years. All the witnesses testified it will take some years use of the land before it will stand up and get hard so that the work will not have to be done. The court allowed these

witnesses to testify that they cleaned out the ditch but when they got down to what they did or where they did it, they could not tell or it was merely insignificant work of a day or so, and nowhere did they ever try to claim that they cleaned out other than the main ditch through Woldson's land. It is our contention that where the district has built a ditch known as the rim ditch, it is just as much their duty to keep them cleaned out as it is any other ditch. It would catch this water before it seeped down into the land and came up in form of springs. That is what it was put in there for and it has been ordered maintained by the court. The other drag line ditches were built through Woldson's land by the District. No farmer could afford to maintain a drag line to clean out his ditches, and as he paid for maintenance, he should have it. They never made any claim of cleaning them out and positively refused to do so. To show how far these people went, Copeland said that 75% of the money of the entire district had been spent for the benefit of 600 or 700 acres of the Mirror Lake district. We challenged that and they could not produce a single item to sustain it. They had the books and records in their possession. We could not get them until after the case was being tried in court. He finally admitted that the main ditch on which the money actually was spent drained about 2500 acres out

of the 4400, P. 404. Bauman and Copeland both tried to say that in 1940 they cleaned out the ditch twice but upon re-calling the secretary, Plaintiff's Exhibit No. 35, P. 447, which was the minutes of the commissioners meeting of July 7, were produced, and it showed that they refused to do more than clean out two slides in the main ditch not to exceed two eight-hour days. That is the sum total that they cleaned out this ditch in 1940 and that was in the main ditch and not in any of the other laterals. It is for reasons of this kind that the law has limited these people in their authority to clean out ditches and not give them any discretion in the matter. If these people have discretions so that they can clean out the ditches, or not, as they see fit, then if they think their land is being left too dry they can do as they have been doing. In our opinion the reason the law is made mandatory and that they are not given any discretion is so that the commissioners and all of them have to do exactly what the law requires.

DEFENSE

In addition to the matters above set forth the defendants pleaded as an alleged defense an order on a petition filed by Mr. Woldson as a bondholder of the district asking that all of the ditches be cleaned out and improvements made, etc. The Court for some reason at that time, and

very probably because of the moratorium law of 1933, which is House Bill No. 105, P. 54 Idaho Session Laws 1933, the 1935 Act again extending it, dismissed the proceedings without prejudice and with a right to renew it at any time. They tried to plead that as a settlement for Woldson's rights as a landowner whereas the proceeding was brought by him for the protection of some bonds that he held. Of course, it is well settled that where a matter is dismissed without prejudice to bring it again it is not a settlement of the rights of the parties.

Abraham v. Casey, 179 U. S. 210; 45 L. Ed. 156;

Lyon v. Perin & Gaff Mfg. Co., 125 U. S. 689; 31 L. Ed 839;

Moore v. Russell, 65 Pac. 624.

Wells v. Western Union T. Co., 123 N.W. 371, where the court says:

> "The dismissal of an action in the federal court without prejudice, after the federal circuit court of appeal had reversed judgment for plaintiff, and remanded the cause, is not an adjudication which bars a subsequent action in a state on the same action."

Harrison v. Remington Paper Company, 140 Fed. 385, where Judge Sanborn said:

> "Rulings and decisions in the course of an action which is subsequently dismissed without prejudice to a future action raise no estoppel. The only adjudication by such a judgment *is*

that nothing is adjudged and that the parties are as free to litigate the issue as though the action had not been commenced."

Hardin v. Hardin, 129 N. W. 108:

"The particular right or cause of action named therein being preserved by the former decree, it necessarily follows that the plaintiff's right to prove his cause of action by any competent evidence is also preserved, even though the evidence necessary to prove it be identical with that in the former action."

We respectfully submit that the defense pleading the order set out by the defendants is without merit and the court made no finding on that defense.

Assignment of Error XV:

"The court erred in sustaining the objection to the admission in evidence of plaintiff's exhibits 20, 21 and 23."

These exhibits were called for in the praecipe but as they were rejected exhibits they have been sent up and are not printed in the record. In a way they are but accumulative. They constitute the letter from Martin Woldson to the Drainage District under date of November 30, 1940, being Plaintiff's Exhibit 8 and the bill thereto attached, shown on pages 132 to 135 of the record, and also the checks, and bills which he paid.

They are simply a conclusive proof of the fact that the bills were paid, the amount of them, and the testimony showed that they are necessarily

incurred. If an officer fails to do his duty and the party who has the right to have that duty performed does perform it, or have it performed, he certainly is entitled to the compensation therefor if it is reasonable, but in addition to that, in this case it was in mitigaton and reduction of the damages.

Martin Woldson had the right to do this work and charge the expense as damages. He did not have to stay there year after year, paying these taxes and not get the land drained. If he could drain this land in a couple of years, then the defendants would be absolved from further damage. In the first year it is shown that he got between 90 and 100 acres of it cropped. That would be a reduction in damages of $900 to $1,000. If it took two years it would duplicate that amount. If by doing the same amount of work or less the next year he could complete the draining of the land, then he would be mitigating the damages, and he had a right to do this, as it is a fundamental principle that where one can reduce or mitigate the damages they should do so,

Christensen v. Gorton, 36 Idaho 436,

Collins v. Twin Falls etc., Water Co., 28 Idaho 1,

Buhl Highway Dist. v. Allred, 41 Idaho 54.

Woldson did not have to sit idly by and lose

the use of his land. He could proceed to do what was necessary to stop this loss, and certainly the defendants would be responsible therefor.

In conclusion we respectfully submit:

(1) The Court made no findings upon the issues raised by the complaint and answer in this case. Under the rules of the Supreme Court, these findings are now required as an absolutely mandatory matter on the part of the trial judge and where the findings were not made the judgment cannot stand.

(2) We respectfully submit that in this case they cannot question the right of Woldson to have these ditches cleaned out as three decisions in the state court adjudged that right and these commissioners are successors in interest and are therefore bound by those decrees, and those orders bind them, and all parties connected with them, and cannot be questioned.

(3) We further respectfully submit that under the law and the statutes of the State of Idaho the defendants have a mandatory duty to perform in maintaining and draining this land and that they have deliberately and intentionally refused to perform that duty, or as stated by Bauman himself as a witness, after calling his attention to the resolution, he said:

"Q. That is the position you took? A. That was just the way we felt."

That was the position he took, yet in one year's time 90 acres of it was cropped.

Woldson lost the first year's use of all the lands but the next year got 90 acres in and saved $900 damage. In another year's time, if allowed to proceed, Woldson would have the land reclaimed and instead of suffering the damage of about $2200 a year for the loss of the use of the land, and paying a considerable sum more in maintenance taxes it would perpetually reclaim the land, stopping the damages for all time to come.

We respectfully submit that in this case the Court erred in entering the judgment and decree and the judgment should be reversed and judgment ordered entered in favor of the appellant.

Respectfully submitted,

EZRA WHITLA
E. T. KNUDSON

Attorneys for Appellant,

Res. & P. O. Address:
Coeur d'Alene, Idaho.

APPENDIX NO. I

VIII.

The Court erred in entering Findings of Fact No. 2 for the reason that the same is contradictory to the evidence, is not a finding of fact but is a conclusion of law and that the question of the defendants being liable for the acts of their predecessors was not an issue in controversy in this case and that no such claim was ever made by the plaintiff.

IX.

The Court erred in making Finding of Fact No. 3 for the reason that said finding of fact is not sustained by the evidence, but is contrary to the uncontradicted evidence in the case and is not a finding of fact but is a conclusion.

X.

The Court erred in making Conclusion of Law No. 1 for the reason that the same is improper, is not sustained by the evidence in the case and the undisputed evidence shows that the defendants S. M. Bauman and Roy Copeland are guilty of malfeasance, misfeasance and nonfeasance as Commissioners of Drainage District No. 1 and that they positively refused to perform their duty.

XI.

The Court erred in making Conclusion of Law

No. 2 based upon the errenoeous finding of fact.

XII.

The Court erred in failing and neglecting to make findings upon the issues in this case as follows, to-wit:

(a) The Court erred in failing to make findings upon Paragraph 2 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(b) The Court erred in failing to make findings upon paragraph 3 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sustained by the undisputed evidence in the case.

(c) The Court erred in failing to make findings upon Paragraph 4 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sutsained by the undisputed evidence in the case.

(d) The Court erred in failing to make findings upon paragraph 5 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true

and ordered by the court having jurisdiction.

(e) The Court erred in failing to make findings upon Paragraph 6 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(f) The Court erred in failing to make findings upon Paragraph 7 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(g) The Court erred in failing to make findings upon Paragraph 8 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(h) The Court erred in failing to make findings upon Paragraph 9 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction and the uncontradicted evidence shows that the said Commissioners refused to comply with their duties and do said work.

(i) The Court erred in failing to make findings upon Paragraph 10 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true

and ordered by the Court having jurisdiction and the allegations of said paragraph are conclusively shown and there is no dispute thereto.

(j) The Court erred in failing to make findings upon Paragraph 11 for the reason that the same are material in the case and are shown by the uncontradicted evidence to be true and shows that the defendants wilfully and intentionally refused to perform their duties as Commissioners.

(k) The Court erred in failing to find upon Paragraph 12 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(l) The Court erred in failing to find upon Paragraph 13 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(m) The Court erred in failing to find upon paragraph 14 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(n) The Court erred in failing to find upon paragraph 15 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(o) The Court erred in failing to find upon paragraph 16 for the reason that the same is

shown by the uncontradicted evidence in the case to be true and is material in the case.

XIII.

The Court erred in failing to sustain the objections and exceptions of Martin Woldson to the proposed findings of fact as shown by said exceptions and objections filed herein.